United States Court of Appeals

for the Second Circuit

REPLY BRIEF

77-7237

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

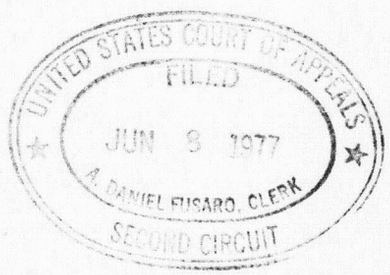
BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,
Plaintiffs-Appellees,

V.

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY, AND WILLIAM J. RONAN, W.
PAUL STILLMAN, JAMES G. HELLMUTH,
VICTOR R. YANITELLI, MILTON A. GILBERT,
HOWARD SCHULMAN, ROBERT F. WAGNER,
JAMES C. KELLOGG, III, LEWIS L. GLUCKMAN,
JOSEPH F. CULLMAN, III, ALAN SAGNER,
Defendants-Appellants

On Appeal From Order of United States District Court
For the Southern District of New York,
Judge Milton Pollack

BRIEF IN RESPONSE TO U.S. AS AMICUS CURIAE BY TOWN OF HEMPSTEAD, INCORPORATED VILLAGE OF LAWRENCE, ET AL., AMICI CURIAE



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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE,	:	
Plaintiffs-Appellees,	:	
v.	:	77-7237
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, ET AL.,	:	
Defendants-Appellants	:	

BRIEF IN RESPONSE TO UNITED STATES AS AMICUS CURIAE BY TOWN OF HEMPSTEAD, INCORPORATED VILLAGE OF LAWRENCE, ET AL. AMICI CURIAE

The suggestion of the Government that the judgment below may be affirmed upon the ground that the action of the Port Authority is "discriminatory", or "unreasonable", or "arbitrary" in failing to permit the Concorde to land at JFK, ignores the elementary concepts of due process of law. Every lawsuit should be determined upon a record delineated by the issues raised by the pleadings upon which opportunity has been given to present evidence both pro and con. There is no record in the court below where any issue has been raised as to whether the action of the Port Authority is discriminatory, unreasonable, or arbitrary, nor has any evidence been presented thereon.

The cases cited by the Government on p. 20 of its brief relate to the right of a non-appealing party to support the judgment below based on matters in the record litigated and overlooked or ignored by the Court below. They do not authorize the appellate court to consider matters not litigated below.

It is perfectly clear that Judge Pollack on July 6, 1976, held that the pleadings before him disclosed a narrow legal question. In its memorandum denying a motion to intervene pursuant to Rule 24 (a)(2) of FRCP the District Court held:

> "This conclusion appears especially apposite to the instant case, for the applicants for intervention might well be tempted to focus their attention on the aspects of the Concorde's operations of greatest concern to them, as opposed to the narrow legal questions placed in issue by the pleadings in this action."

It is perfectly clear that the Government's suggestion smacks of an Article 78 proceeding under the New York Civil Practice Act. The only difficulty with such a procedure in the United States Court of Appeals for the Second Circuit lies in the absence of a notice and opportunity to be heard. Neither of these basic rights have been complied with at this time.

It should not be overlooked that the airlines' complaint contains Count Four which purports to allege that the action of the Port Authority constitutes an unreasonable burden

upon interstate commerce. However, the airlines consciously excluded Count Four as a basis for their motion for summary judgment because implicit in Count Four is the existence of material issues of fact relating to unreasonableness.

So also with respect to the Government's suggestion that the Port Authority conduct is arbitrary, discriminatory, and unreasonable. At this time the Port Authority is being condemned without a hearing on what it has or has not done with respect to implementing its resolution. It is a matter of public record that the United States Government, through the FAA, took a little over ten years of study to produce the F.A.R. 36 standards governing noise emissions by subsonic jets. It seems rather out of place for that same Government to complain about a delay of a matter of a few months on the part of the Port Authority to investigate the impact of a new type of deleterious invasion of the rights of four hundred and fifty thousand citizens living near JFK. Whether this delay is reasonable or unreasonable is dependent upon a full exposure of the attendant circumstances. This is not in the record before this Honorable Court.

Another basic error of the Government's suggestion lies in the fact that it assumes that it is discriminatory and arbitrary to refuse to let the Concorde demonstrate that it can achieve compliance with existing Port Authority noise standards at JFK. It does not follow that an actual flight into and out of JFK is essential to such a demonstration. There are other ways to determine Concorde's ability to comply with the Port Authority's noise standards, than to land and take-off at JFK. The data at Dulles and at Heathrow shows that the Concorde emits an intensity of noise varying between four and eight times that of the subsonic jets, depending on how successfully the pilot "beats the box". Beating the box merely means that a maneuver is performed by the pilot that prevents the monitoring device from recording the full impact of the noise. For example, the path of the plane will not fly directly over the measuring device, as it is supposed to do, for measurements at that point. The total noise emitted by the Concorde's engines and its impact on the residents is not altered by "beating the box". Only the recording of that noise is affected.

There is no need to subject the residents to the risks entailed by the actual landings and take-offs of the Concorde to acquire any test information. Such information can be

obtained in other ways. Why do we have to accept the assumption that the conduct of these Concorde tests, using the residents around JFK as subjects, to obtain the limits of their tolerance to noise, etc., is the only way we can acquire"the good will of our allies". If that is the price, prudence dictates that we reassess the value of this "good will" and the need, if any, for its preservation. One wonders whether counsel for the Government, having admitted that there is no preemption, have made this suggestion solely for placating or ameliorating "our allies" rather than as a sound judicial basis for disposing of this appeal.

The suggestion of the Government for affirming Judge Pollack's Judgment refers to another and different record and lawsuit. It can have no application to the issues presented to the District Court for its determination, nor to this Honorable Court on this appeal.

Respectfully submitted,

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